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No. 04-5293
(CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Carman L. Deck, was convicted in the Circuit Court of Jefferson County, Missouri, of two counts of first-degree murder and given two death sentences. The facts of this case are summarized in the opinion of the Missouri Supreme Court affirming Petitioner's first-degree murder convictions and death sentences. *See State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999), *cert. denied*, 528 U.S. 1009 (1999). Later, during Petitioners's appeal from the denial of post-conviction relief, the Missouri Supreme Court set aside Petitioner's death sentences and remanded this case for retrial of the penalty phase. *See Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). The penalty phase was subsequently retried and the jury again recommended, and the trial court imposed, two death sentences, which sentences were affirmed by the Missouri Supreme Court. *See State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004). Petitioner now seeks certiorari of the Missouri Supreme Court's decision affirming these death sentences.

ARGUMENT

A petition for writ of certiorari must present a compelling reason for granting the petition. Compelling reasons are: a) that a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; and, b) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10. This case involves no important question of federal law, much less one that has been decided in conflict with this Court's decisions.

Restraints During Penalty Phase Retrial

Petitioner contends the trial court's use of restraints during the penalty phase retrial violated the Constitution. But his failure to demonstrate a compelling reason why this Court should grant his petition for a writ of certiorari is twofold. First, he failed to make an adequate record before the trial court on the restraint issue. And, second, this Court has upheld the use of restraints during a criminal proceeding, and has never held that use of restraints are per se unconstitutional.

1. The use of restraints at Petitioner's trial.

Before the penalty phase retrial, the trial court ordered that Petitioner be allowed to dress in court clothes for trial, but overruled his motion to appear free from restraints and shackles. During voir dire, but outside the presence of the jury, the trial court again overruled Petitioner's objection to wearing leg irons and a belly chain. During voir dire, Petitioner's counsel raised the restraint issue before the venire panel by asking whether anyone would be affected by Petitioner's shackles; no one responded that it would have any affect. *Deck*, 136 S.W.3d at 485.

Other than directing the venire panel's attention to Petitioner's restraints, Petitioner "made no record of the extent of the jury's awareness of the restraints." *Id.* Moreover, no record was made that the restraints "impeded [Petitioner] from participating in the proceedings." *Id.* Finally, the Missouri court found that Petitioner was a flight risk "in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody." *Id.*

Without a contemporaneous and detailed record concerning the type and extent of restraints applied to Petitioner during the penalty phase retrial, granting his petition for a writ of certiorari on this issue would be pointless. This Court has never held that the use of restraints during a criminal

proceeding is per se unconstitutional. Consequently, the lack of an adequate record concerning the restraint issue does not allow this Court to issue an opinion that would provide useful guidance to lower courts.

Nothing in the record reveals how noticeable Petitioner's restraints were to the jury, or how aware the jurors were of the restraints until Petitioner directed their attention to them during voir dire. Nothing in the record shows that the jury could see the leg restraints, or even the belly chain, while Petitioner was seated. The record does not reflect whether the jurors saw Petitioner being led into the courtroom in restraints, or, what's more likely, whether he was already seated when jurors were brought into court. Finally, Petitioner made no showing that the restraints hindered his ability to participate in the proceedings.

This case did not involve a penalty phase that was conducted immediately after a guilt-phase trial in which Petitioner had not been shackled, but was a retrial of a penalty phase conducted years after the initial finding of guilt. The jury picked for this retrial – obviously not the same one that initially decided Petitioner's guilt – was repeatedly told both before and during the retrial that Petitioner had already been found guilty of a double-homicide.

This case also presented security concerns not present in other penalty phase proceedings. Petitioner, who had already spent several years in prison, was aware that the guilty verdicts for both counts of first-degree murder had been upheld on both his direct and post-conviction appeals. Other convicted murderers, even those sentenced to death, can appeal hoping for a new guilt-phase trial on appeal. But the only issue that remained for Petitioner was whether he would die or spend the rest of his life in prison; and he had already been sentenced to death once before for these murders.[1]

Petitioner neither sought a hearing on the necessity of the restraints, nor offered an alternative to the restraints then being used. Petitioner claimed prejudiced simply because he was restrained, yet he made no contemporaneous record suggesting that any further inquiry into the matter was necessary.

2. Restraints and the presumption of innocence.

The idea that a criminal defendant should appear free from restraints and not be forced to wear prison clothing derives from the presumption of innocence to which each defendant is entitled. *Holbrook v. Flynn*, 475 U.S.

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[1]Under Missouri law, the only possible sentence for a person convicted of first-degree murder is either death or life imprisonment without the possibility of parole. Mo. Rev. Stat. § 565.020.2 (2000).

560, 567 (1986). On the other hand, not every practice that singles out the accused from others in the courtroom is inherently unconstitutional:

> This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence.

Id. In *Holbrook*, this Court held that a robbery defendant's constitutional rights were not violated during his joint trial with five co-defendants when normal courtroom security was supplemented by four uniformed state troopers seated in the first row of the spectator's section. *Id.* at 571-72.

This Court has relied on the presumption of innocence in other cases involving security concerns:

> To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

Estelle v. Williams, 425 U.S. 501, 503 (1976). In *Estelle*, this Court held that a State cannot constitutionally compel a criminal defendant to wear prison clothes during trial, but distinguished this from the use of restraints because "[u]nlike physical restraints . . . compelling an accused to wear jail clothing

furthers no essential state policy."[2] *Id.* at 505. Petitioner also relies on *Illinois v. Allen*, 397 U.S. 337 (1970), but that case does nothing to advance his argument since it involved a criminal defendant's Sixth Amendment right to be present at his own trial after he was removed from the courtroom for abusive and disruptive behavior.

3. The use of restraints during a capital trial's penalty phase.

Petitioner's argument is grounded on the presumption of innocence. But this presumption is not a concern during the penalty phase of a capital-murder trial after the defendant has been found guilty of first-degree murder. *See State v. Young*, 853 P.2d 327, 350 (Utah 1993); *Duckett v. State*, 752 P.2d 752, 755 (Nev. 1988); *Bowers v. State*, 507 A.2d 1072, 1081 (Md. 1986), *cert. denied*, 479 U.S. 890 (1986). As Petitioner concedes, this Court has never held that the use of restraints during a penalty phase is per se unconstitutional. In fact, it has never held that it is unconstitutional to use restraints during any criminal trial. In considering courtroom security issues, this Court has rejected an approach that presumes all security practices are inherently prejudicial, but has instead adopted a case-by-case method in reviewing such claims. *See Holbrook*, 475 U.S. at 569. Using this

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[2]In *Estelle*, the Court found no constitutional violation because nothing in the record showed that the defendant was "compelled" to wear prison clothes at trial. *Id.* at 512.

method to review the restraint issue in Petitioner's case is made all the more difficult by his failure to make a contemporaneous, detailed record at trial.

Even if such a record had been made, the presumption of innocence is not an issue in this case. The retrial of Petitioner's penalty phase occurred years after a jury in 1998 found him guilty of two counts of murder. Not only have these guilt-phase verdicts been upheld after both direct and state post-conviction appeals, but the jury was constantly reminded by both sides throughout the penalty phase retrial that Petitioner had been found guilty of two counts of first-degree murder.

The Missouri Supreme Court has upheld the use of restraints during criminal proceedings. *See State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1997), *cert. denied*, 522 U.S. 854 (1997) (defendant required to wear leg shackles during part of guilt phase in capital-murder trial); *State v. Amrine*, 741 S.W.2d 665, 675 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988) (defendant's legs shackled to chair during entire trial on capital murder charge); *see also State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1998), *cert. denied*, 524 U.S. 957 (1998) (trial court did not abuse its discretion in failing to declare a mistrial after the jury witnessed the defendant being handcuffed immediately after the guilt-phase verdicts were read and before the penalty phase began). In *State v. Hall*, 982 S.W.2d 675 (Mo. banc 1999), *cert. denied*,

526 1151 (1999), the Missouri Supreme Court held that the trial court did not err in overruling the defendant's objection to his wearing "leg and waist shackles during the penalty phase." *Id.* at 685.

During the federal habeas proceeding that followed the Missouri Court's decision in *Hall*, the Eighth Circuit also found no constitutional violation when it considered the restraint issue. *Hall v. Luebbers*, 296 F.3d 685 (CA8 2002), *cert. denied*, 538 U.S. 951 (2003). The federal court found no evidence in the record either that the jurors ever saw the leg and waist shackles or that the shackles hindered the defendant's ability to participate in the proceedings. *Id.* at 698-99. The court also rejected the argument (also advanced by Petitioner in this case) that the use of the shackles during the penalty phase improperly affected the jury's sentencing decision:

> We do not find persuasive any contention that the use of shackles during the penalty phase would necessarily lead jurors to conclude that they must impose a death sentence. These jurors had already found Hall guilty of first degree murder and could have found shackles to be a reasonable security measure.

Id. at 699 (citation omitted).[3]

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[3]The omitted citation is to *Elledge v. Dugger*, 823 F.2d 1439 (CA11 1987), *opinion withdrawn in part*, 833 F.3d 250, *cert. denied*, 485 U.S. 1014 (1988), a case on which Petitioner relies. The conclusion with which the Eighth Circuit disagree – that penalty-phase jurors seeing shackles would impose death – was relied on in *Elledge* to find a constitutional violation. *Id.* at 1450. But, as explained below, the decision in *Elledge* rested on the trial court's failure to follow procedural requirements in determining whether

The cases on which Petitioner relies do not assist him here. Most of these cases do not involve a finding that the trial court violated the Constitution by using restraints, but instead turn on the trial court's failure to follow court-imposed procedural requirements before using restraints. *Duckett v. Godinez*, 67 F.3d 734, 748-50 (CA9 1995), *cert. denied*, 517 U.S. 1158 (1996) (ordering new penalty phase when the state trial court failed to make a record showing compliance with that circuit's "two-step" process before restraining a defendant); *Bello v. State*, 547 So.2d 914 (Fla. 1989) (ordering new penalty phase when the trial court failed to honor the defendant's request for an inquiry into the need for shackling); *Laird v. Horn*, 159 F. Supp.2d 58, 101-02 (E.D. Pa. 2001) (ordering new penalty phase when the state trial court failed to conduct a hearing or make findings on the record on the need for shackling); *Elledge v. Dugger*, 823 F.2d at 1451-52 (ordering a new penalty phase when the state trial court failed to conduct a hearing or make a record showing that shackling was necessary);[4] *Lovell v. State*, 702

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restraints were necessary.

[4]Petitioner relies heavily on *Elledge*, but the opinion in that case concludes that a "case-by-case" approach to the issue is inconsistent with controlling precedent. 823 F.2d at 1450-51. This statement is directly contrary to this Court's holding in *Holbrook*, which mandated a case-by-case approach. Ironically, the Eleventh Circuit purportedly relies on *Holbrook* in reaching its judgment. *Id.* The majority opinion in *Elledge* was not even accepted by all the judges on the Eleventh Circuit as reflected by the opinion of the dissenting judge and the several judges who dissented from the court's

A.2d 261, 273-74 (Md. 1997) (ordering a new penalty phase when the trial court failed to make an adequate record showing the need for shackling).[5]

This Court has never suggested that the Constitution requires that any particular procedure be followed before restraining a convicted murderer, but has instead relied on a case-by-case approach in resolving issues concerning restraints. What types of procedures trial courts must employ in making this determination does not involve constitutional issues. In the end, each case stands or falls on its own facts. Petitioner's desire to create a uniform rule to control these types of inquiries is simply an attempt to constitutionalize the method or procedure in making this inquiry and to make any deviation from those procedures a constitutional violation. But the manner of inquiry for the fact-specific inquiry regarding restraints is not something of constitutional

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refusal to hear the case en banc. *See Elledge v. Dugger*, 833 F.2d 250 (CA11 1987); *see also People v. Seaton*, 28 P.3d 175 (Cal. 2001), *cert. denied*, 535 U.S. 1036 (2002).

[5]Petitioner's reliance on *Tyars v. Finner*, 709 F.2d 1274 (CA9 1983) and *Lemons v. Skidmore*, 985 F.2d 354 (CA7 1993) also does not assist him since both involved civil, not criminal proceedings. *Tyars* involved the trial court restraining a severely retarded man before the jury during an involuntary civil commitment proceeding when no record had been made concerning the need for restraints. *Id.* at 1284-85. *Lemons* involved restraining the plaintiff, an inmate, during the civil jury trial on his § 1983 lawsuit against prison guards. *Lemons*, 985 F.2d at 356. In addition, the court in *Lemons* did not reach the constitutional issue but only addressed what procedures district courts must follow in determining whether restraints are warranted. *Id.* at 356-59.

dimension. but is simply a matter of procedure best left to the discretion of state courts.

CONCLUSION

Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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04-5293

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that twelve true and correct copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the case of Carman L. Deck v. State of Missouri, No. 04-5293 were mailed, pursuant to Supreme Court Rules 29.2 and 29.5(b), postage prepaid, this 27th day of September, 2004, to:

William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
United States Courthouse
Washington, D.C. 20543

Further, I hereby certify that three true and correct copies of the foregoing documents in this cause were mailed pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 27th day of September, 2004, to:

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